

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

RECEIVED

Stephen Andrews and John Carpenter Appeal

JUN 30 2006

Docket No. 06-04 WC

**STATE'S PARTIALLY ASSENTED TO
OBJECTION TO THE APPELLANT'S MOTION TO RECUSE**

NOW COMES the State of New Hampshire Department of Environmental Services ("State"), by and through its attorneys, the Office of the Attorney General, and respectfully submits this objection to Appellant Andrews Motion To Recuse. The Appellant's motion was untimely filed and is based on information either known to or available to the Appellant at the time of the pre-hearing conference when he had an opportunity to raise the same objection contained in his motion and failed to do so. Due to the untimely filing of Appellant Andrews' Motion To Recuse, the State requests the Council to deny the Appellant's motion. The Town of Salem assents to the relief sought in the State's objection. The State sets forth the basis for its objection as follows:

FACTS

1. On April 5, 2006, the Appellants filed a notice of appeal of the State's denial of their application to waive the "no swim" provision of Env-Ws 386.61(h)(4) ("Appeal").
2. In a pleading dated May 4, 2006, the Town of Salem filed a motion to intervene in the Appeal.
3. On May 8, 2006, the Water Council, through Stephen Densberger as Presiding Officer, held a pre-hearing conference regarding the Appeal and granted the Town of Salem's motion to intervene in the appeal. During the pre-hearing conference, Attorney Gordon Graham, counsel for the Town of Salem, referenced Stephen Densberger's position as the President of the

Pennichuck Water Service Corporation. The Appellants' residences are served by the PEU/W and E (Pennichuck East Utility/West and East) water system, which is owned by Pennichuck Corporation, where Mr. Densberger serves as Executive Vice President. At that time, Mr. Densberger inquired of all parties whether anyone objected to Mr. Densberger continuing to function as Presiding Officer over the Appeal. None of the parties objected and none of the parties indicated that Mr. Densberger should recuse himself from voting on the Appeal at the Water Council Hearing due to his position as the President of the Pennichuck Water Service Corporation.

4. On June 23, 2006, the State filed its list of witnesses, exhibits, and copies of all exhibits it intends to present at the Hearing on July 12, 2006 with the Water Council in accordance with the Council's pre-hearing conference Order. Included in the State's exhibits (DES-6) is a map of Salem and Windham, which is color-coded to show the Water Service Areas for Canobie Lake and the surrounding vicinity, i.e., the Salem Water Department Service Area and the Pennichuck West and East Service Area.

5. On June 29, 2006, the State received Appellant Stephen Andrews Motion To Recuse Mr. Densberger "from deliberations and voting at the conclusion of the [Water Council] hearing." Appellant Andrews cites the State's Exhibit DES-6, Pennichuck's purchase of "a small, shore-front parcel with the intent to draw water directly from Canobie Lake" and recent failed negotiations between the Pennichuck Water Service Corporation and the Town of Salem regarding Pennichuck's desire to purchase water from the Town of Salem for his Motion To Recuse stating that "[i]t is for these reasons that we believe Mr. Densberger may be unable to impartially deliberate and vote on this matter."

ARGUMENT

6. The Appellant's motion is untimely filed. The Water Council's Order dated May 17, 2006 set forth a June 23, 2006 deadline for "filing any and all written Motions." The Appellant claims that his motion is based on the filing of the State's Exhibit DES-6 and information that he learned following the receipt of the State's exhibit. However, all of the information the Appellant relies upon in his motion was either known to him or was available to him prior to the June 23, 2006 deadline for filing all motions.

7. The Appellant knew or should have known at the time of the pre-hearing conference that he receives drinking water from a subsidiary of the Pennichuck Corporation and not from the Salem Water Department. As such, State's Exhibit DES-6, which sets forth a factual representation of the water services areas surrounding Canobie Lake, does not include any information not already known to the Appellant, nor does it make any assertions regarding those service areas. It is merely a graphic representation of known facts.

8. Both Appellants were told at the pre-hearing conference that Mr. Densberger was the President of the Pennichuck Water Service Corporation. Both Appellants were given the opportunity to object at that time to Mr. Densberger's involvement in the hearing and failed to do so.

9. Both Appellants knew or should have known at the time of the hearing that "Pennichuck [had] purchased a small, shore-front parcel with the intent to draw water directly from Canobie Lake" because the land parcel is located near 2 Woodvue Road in Windham, the same road on which the Appellants both reside and the land purchase occurred before or during May 2005. In addition, the claimed recent discussions between the Town of Salem and Pennichuck took place during or prior to September 2005. Moreover, this same issue has been

discussed before, including in April 1999, at a Salem Board of Selectmen meeting, which was open to the public. As such, all of the information relied upon in the Appellant's Motion To Recuse was either known or was available to him at the time of the pre-hearing conference when the Appellant was given the opportunity, but failed to object to Mr. Densberger's involvement in the Water Council hearing as the presiding officer or otherwise as a deliberating and voting member of the Water Council.

10. The granting of the Appellant's motion will prejudice the State. Pursuant to RSA 21-O:7, which establishes the make-up of the Water Council, one of the eleven members of the Council is required to be an "employee of any municipal or privately-owned waterworks in the state." As such, Mr. Densberger's recusal, whose presence, deliberation and voting capability fulfills this requirement, will prejudice the State and the proceeding as a whole because a specific interest required by RSA 21-O:7 will remain unrepresented.

11. For the foregoing reasons, the State requests that the Water Council deny the Appellant's Motion to Recuse.

WHEREFORE, for the foregoing reasons, the State respectfully requests that the Water Council:

- A. Deny Appellant Andrews' Motion to Recuse; and
- B. Grant such other and further relief as the Water Council may deem just and appropriate.

Respectfully submitted,


State of New Hampshire
Department of Environmental Services

By its attorneys,

Kelly A. Ayotte
Attorney General

Dated: June 30, 2006

By

COPY

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Certificate of Service

I certify that a copy of the foregoing was mailed first class postage prepaid this 30th day of June 2006 to Mr. Stephen M. Andrews, Mr. John Carpenter, and Gordon Graham, Esq, Counsel for the Town of Salem.

COPY

Esther B. Piszczek